

No. 6077

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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THOMAS DAY COMPANY, a corporation,
and WHITMAN SYMMES,

Appellants,

VS.

CLAUDE R. KING, Receiver of Thomas
Day Company, ROBERTS MANUFACTURING
COMPANY, a corporation, and
GILL VIRDEN COMPANY, a corporation,

Appellees.

**Brief of Roberts Manufacturing Company,
a Corporation, Appellee.**

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Index

	Pages
FOREWORD	1
REPLY TO APPELLANTS' BRIEF.....	3
Appellants' admissions dispose of this appeal.....	3
What was sold and what was not sold.....	4
What is the "goodwill" of a going concern?.....	5
The goodwill of a business can be sold under the Cali- fornia authorities	6
Thomas Day Company could have transferred the good- will of its business and even the right of using the name. If Thomas Day Company could do so, so could the Receiver	6
The transfer of the goodwill of a business necessarily involves the right of the purchaser to hold himself out as the successor to the old firm.....	8
CONCLUSION	11

Table of Cases Cited.

<i>Civil Code of California</i> , Sec. 992.....	5, 6
<i>Civil Code of California</i> , Sec. 993.....	6
<i>Clement v. Duncan</i> , 191 Cal. 209, 222.....	10
<i>Menendez v. Holt</i> , 128 U. S. 514; 32 Law. Ed. 526.....	6
<i>Moore v. Rawson</i> , 199 Mass. 493; 85 N. E. 586, 590.....	9
<i>Reid v. St. John</i> , 68 Cal. App. 348, 356.....	7, 10
<i>Ruppe v. Utter</i> , 76 Cal. App. 19, 25.....	6
<i>Slater v. Slater</i> , 175 N. Y. 143; S. C. 61 L. R. A. 796.....	11
<i>Snyder Manufacturing Co. v. Snyder</i> , 54 Ohio St., 86; 31 L. R. A. 657.....	8

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FOREWORD.

On November 25th, 1929, United States District Court for the Northern District of California, Southern Division, in an equity action brought in that court entitled "Gill Virden Company, a corporation, complainant, v. Thomas Day Company, a corporation, defendant", made an order confirming the sale of the

assets of Thomas Day Company, which sale had been theretofore made upon notice in open court on the 17th day of November, 1929.

The regularity of the proceedings leading up to this sale are not challenged upon this appeal and an examination of the Transcript shows that there is no question about the regularity of the sale and all proceedings leading up thereto.

The order confirming said sale is set forth in the Transcript, pages 43 to 46, and is followed by the deed of conveyance and bill of sale executed by the Receiver to Roberts Manufacturing Company, the successful bidder, set forth on pages 46 to 50.

The assets so sold are enumerated and set forth in the order confirming the sale on pages 44 and 45 of the Transcript, which enumeration need not be here repeated except as to the concluding paragraph thereof.

The sale included the physical assets of Thomas Day Company, and

“the business and the goodwill of the business of Thomas Day Company; the right of Roberts Manufacturing Company to hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof.”

Transcript, page 45.

The appeal is directed to the language above quoted.

REPLY TO APPELLANTS' BRIEF.

Appellants' brief upon analysis can be divided under two headings:

First, certain admissions made by appellants which we claim determine the question against them.

Second, appellants have set up a number of "men of straw" and then proceeded to demolish them.

 APPELLANTS' ADMISSIONS.

Let us first refer to the Transcript of Record herein.

In the bill in equity for receiver, in the case of *Gill Virden Company v. Thomas Day Company* (Transcript, pages 2 to 8) it is alleged among other things:

"The property of defendant could be sold as a whole and a going concern for a much larger sum than if sold in smaller parcels under judicial process."

Transcript, page 5.

The bill also alleges that it is to the best interests of the creditors that a Receiver be appointed to take custody and control of the assets of defendant, operate its business and, if possible, pay the claims of the creditors

"and if not possible, under the jurisdiction and order of this Court to sell said property as a whole for the like use and benefit of complainant and other creditors of the defendant."

Transcript, page 6.

The answer of the defendant admits all of the allegations of the bill of complaint as true, and joins in the prayer of the bill. This answer is verified by the appellant Whitman Symmes.

Transcript, pages 9 and 10.

Turning to appellants' brief, we find on page 6 this admission:

“At the outset it is admitted that the receiver had the authority to make, and the court the power to confirm, a sale of the business and physical assets and also the goodwill of the business of Thomas Day Company.”

To our mind this admission disposes of the appeal. Because this is precisely what was done by the court below and the court below went no further except to supply the necessary incidents of a transfer of the goodwill necessarily included therein, without which a transfer of the goodwill would be absolutely inoperative.

WHAT WAS SOLD AND WHAT WAS NOT SOLD.

Let us see what the order complained of did, and what it did not do.

The court confirmed a sale to Roberts Manufacturing Company of all the assets of Thomas Day Company, including

“the business and the goodwill of the business of Thomas Day Company; the right of Roberts Manufacturing Company to hold itself out as

the successor of Thomas Day Company and as having acquired the goodwill thereof.”

Transcript, page 45.

It did *not* sell to Roberts Manufacturing Company the name of Thomas Day Company or its franchise to be a corporation; it did not purport to suspend its corporate functions; it did not dissolve the corporation or affect its right to be a corporation.

For this reason we do not answer appellants' argument based upon the untenable assumption that the court did any of these things.

WHAT IS THE "GOODWILL" OF A GOING CONCERN?

Appellants admit that the court had power to sell the goodwill of the business of Thomas Day Company.

“The goodwill of a business is the expectation of continued public patronage.”

Civil Code of California, Sec. 992.

“Goodwill was defined by Lord Eldon, in *Cruttwell v. Lye*, 17 Ves. 335, 346, to be ‘nothing more than the probability that the old customers will resort to the old place,’ but Vice-Chancellor Wood in *Churton v. Douglas*, Johns. (H. R. V.) 174, 188, says it would be taking too narrow a view of what is there laid down by Lord Eldon, to confine it to that, but that it must mean every positive advantage that has been acquired by the old firm in the progress of its business, whether connected with the premises in which the business was previously carried on, or with the name of

the late firm, or with any other matter carrying with it the benefit of the business."

Menendez v. Holt, 128 U. S. 514; 32 Law. Ed. 526.

The goodwill of a business as so defined can be sold under the California authorities.

"The goodwill of a business is the expectation of continued public patronage, but it does not include a right to use the name of any person from whom it was acquired."

C. C. 992.

BUT

"The goodwill of a business is property, transferable like any other, and the person transferring it *may transfer with it the right of using the name under which the business is conducted.*"

C. C. 993.

In a case involving the dissolution of a copartnership the court said:

"Goodwill is property recognized and protected by the law as such and capable of sale and transfer from one owner to another. *It is an asset which may be sold in connection with a business.*"

Ruppe v. Utter, 76 Cal. App. 19, 25.

"Section 992 of the Civil Code provides that the goodwill of a business does not include the right to use the name of *any person* from whom it was acquired, but the judgment does not give to defendant such a right, but merely the right

to use what was found to have become an *impersonal designation which had become a trade name* and which was transferable with the goodwill of the business under the provisions of section 993 of the Civil Code.”

Reid v. St. John, 68 Cal. App. 348, 356.

It follows that under the California authorities Thomas Day Company could have transferred to a purchaser the goodwill of its business and the right of using the name under which the business is conducted.

If Thomas Day Company could make such a sale, so could the Receiver. In other words, the Receiver could sell all the rights of Thomas Day Company which it itself could have sold. In a well considered Ohio decision, the syllabus by the court is as follows:

“Upon the dissolution of a trading copartnership, its assets, including the goodwill of the business, may be sold as a whole, either by the partners directly, or through a receiver under an order of the court in a case to which they are parties; and a purchaser thereof, under either method of sale, is entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose.”

The language of the court is as follows:

“We are not reluctant, therefore, in holding that upon the dissolution of a trading copartnership its assets, *including the goodwill of the business*, may be sold as a whole, either by the partners directly, or *through a receiver* under an order made by a court in a case to which they are parties; and that a purchaser thereof under

either method of sale is *entitled to continue the business as the successor of the firm, and make use of the firm name for that purpose.* And, further, that where the purchaser transfers the property so acquired by him to a corporation of which he is a member, organized to succeed to the business, it may carry on the business in the same manner under a corporate name including the name which had been used by the firm. If it is desired to limit the right of the purchaser or his vendee in the use of the firm name, or exclude such right altogether, it should be done by stipulation in the contract when the sale is made by the partners, or by a provision to that effect in the order, when the sale is made through the court.”

Snyder Manufacturing Co. v. Snyder, 54 Ohio St. 86; 31 L. R. A. 657.

The transfer of the goodwill of a business necessarily involves the right of the purchaser to hold himself out to the public as the successor to the old firm.

How could Roberts Manufacturing Company rely upon “the expectation of continued public patronage” unless the public be informed that it has acquired the business and the goodwill of the business?

How could such a transfer be effective if the purchaser could not apprise the public that it had succeeded to the business of Thomas Day Company and had acquired the goodwill thereof?

Unless the purchaser could hold itself out as the successor of Thomas Day Company and as having acquired the goodwill thereof, the sale to it of the goodwill would be absolutely ineffectual.

This results from the nature of the "goodwill" of a business, an evanescent, intangible thing that can only operate through publicity.

The courts have always recognized the right of the purchaser of a "goodwill" to hold itself out as the successor of the former concern.

"The questions principally discussed relate to the right of a purchaser of the goodwill to use the firm name. The right to use the firm name, for the purpose of designating the business carried on by a purchaser as a continuation of that done by the old firm, passes with a sale of the goodwill. This is an exclusive right. The limitations upon its exercise are only such as are necessary to protect the rights of the partners or others. Such a limitation is expressed in Rev. Laws, c. 72, sec. 5. The purchaser has no right to use the name in such a way as to indicate that the business is then being conducted by *persons* who have no connection with it. Each member of the old firm, like everybody else, has a right to use his own name in a new business, either alone, or with the names of others who are associated with him. But after a sale of the goodwill, no one but the purchaser can lawfully use the firm name as an indication that his business is a continuation of that of the old firm.

A convenient way of using the firm name by a purchaser of the goodwill, if rights of third persons are involved, is by advertising as the *successor to the former firm.*"

Moore v. Rawson, 199 Mass. 493; 85 N. E. 586, 590.

In a recent California case it was said:

"Under our code the goodwill of a business is property, transferable like any other, it being

‘the expectation of continued public patronage.’ (Civ. Code, secs. 992 and 993.) The transfer of the partnership business to the corporation necessarily involved a transfer of the goodwill of the business.”

Clement v. Duncan, 191 Cal. 209, 222.

And in a well considered California case the court said:

“In this case, the transfer of the business was made, admittedly, by an instrument reading, in part, as follows: ‘R. L. Reid * * * does by these presents sell unto the party of the second part * * * his right, title and interest of, in and to all of that certain drugstore business now being conducted under the name of Reid’s Drugs * * * together with the goodwill thereof, all the stock of drugs and merchandise now on hand, all appliances and all equipment and fixtures used in connection with said business.’

Appellant contends that section 993 of the Civil Code made it necessary for plaintiff to expressly mention the name under which the business was conducted in order to transfer to defendant the right to use the same. But said section does not so provide. It reads: ‘The goodwill of a business is property, transferable like any other, and the person transferring it may transfer with it the right of using the name under which the business is conducted.’ That is precisely what the trial court has found that the plaintiff did—transferred with the goodwill of the business, the right to use the name under which it was conducted.”

Reid v. St. John, 68 Cal. App. 348, 355-6.

In a well considered New York case the court said:

“We think that the learned court below was correct in so far as it decided that the firm name was inseparable from the goodwill, and hence just as much a part of the assets of the firm as the goodwill itself. This proposition seems to be supported by the great weight of authority.”

Slater v. Slater, 175 N. Y. 143; S. C. 61 L. R. A. 796.

CONCLUSION.

For the foregoing reasons we respectfully submit that the court below did not err in its order confirming the sale to Roberts Manufacturing Company.

The sale was ordered and held for the purpose of realizing as large a sum for the creditors of Thomas Day Company as could be obtained.

It is obvious that the creditors were entitled to receive not only the value of the stock of merchandise on hand but the value of the business as a going concern and the value of the goodwill thereof.

But no person would bid a substantial sum for the goodwill of the business unless he were entitled to advise the public that he had purchased the goodwill of the business.

Roberts Manufacturing Company bid at the sale the sum of \$42,500.00 for the physical assets and for the

goodwill of the business. Manifestly a considerable portion of this sum was bid for the goodwill.

It is equally obvious that if the goodwill of the business were eliminated a much less sum would have been realized for the benefit of the creditors.

In view of all these considerations we submit that the order appealed from must be affirmed.

Respectfully submitted,

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Company, a corporation, Appellee.*